

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 28, 2005

GARY WAYNE CALHOUN v. HOWARD W. CARLTON, WARDEN

Appeal from the Criminal Court for Carter County
No. S17,334 Lynn W. Brown, Judge

No. E2005-00001-CCA-R3-HC - Filed February 23, 2006

The petitioner, Gary Wayne Calhoun, appeals the Carter County Criminal Court's order dismissing his petition for a writ of habeas corpus. He claims his five judgments of conviction resulting from his pleas of guilty are void because his sentences are illegal. We affirm the judgment of the trial court with regard to four of the five challenged judgments. We hold that the sentence for the fifth challenged judgment of conviction is illegal, and we grant habeas corpus relief as to that conviction. We remand the case to the Carter County Criminal Court for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part;
Reversed in Part; Case Remanded**

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Gary Wayne Calhoun, Mountain City, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; and Joe C. Crumley, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the petitioner's guilty pleas and resulting sentences in 1988. The record reflects that on March 4, 1988, the petitioner pled guilty in Washington County to one count of receiving stolen property and one count of larceny, and the trial court sentenced the defendant to three years for each offense, ordering the defendant to serve the sentences consecutively to each other and concurrently with any sentence the defendant would receive from Sullivan County. On March 23, 1988, the defendant pled guilty in Sullivan County to one count of bringing stolen property into the state, and the trial court sentenced the defendant to seven years incarceration. On May 31, 1988, the petitioner pled guilty in Sullivan County to one count of armed robbery, and the trial court sentenced him to fifteen years, ordering the defendant to serve the seven-year sentence imposed on

March 23, 1988, consecutively to the fifteen-year sentence imposed on May 31, 1988. On October 28, 1988, the defendant pled guilty to one count of grand larceny in Carter County, and the trial court sentenced him to ten years, ordering the first four years of the sentence to be served in incarceration concurrent with the defendant's sentences from Sullivan County and the last six years of the sentence to be served on probation consecutive to the defendant's sentences from Sullivan County.

On November 8, 2004, the petitioner filed a petition for the writ of habeas corpus. The state filed a motion to dismiss, which the trial court granted. Thereafter, the petitioner filed a "Motion in Traverse to State's Motion to Dismiss" arguing that the trial court violated his right to due process by not allowing him to respond to the state's motion before dismissing his petition.

On appeal, the petitioner contends that the trial court erred in dismissing his petition. He claims that the Washington County judgments of conviction are void because the trial court did not have the authority to order his sentences to be served concurrently with sentences imposed in the future. He claims the Sullivan County judgment of conviction entered on March 23, 1988, is void because the trial court did not have the authority to order his sentence in that case to be served consecutively to the future sentence imposed on May 31, 1988. He also claims that both Sullivan County judgments of conviction are void because the state violated Tennessee Code Annotated section 40-35-102 by failing to file a notice of its intent to seek enhanced punishment and because the Sullivan County Criminal Court erroneously sentenced the petitioner as an "Especially Aggravated Offender." Finally, the petitioner claims the Carter County judgment of conviction is void because the trial court did not have the authority to impose a split sentence for a single conviction that is both concurrent and consecutive to other sentences, because his sentence was four years above the maximum sentence he should have received, and because the Carter County Criminal Court violated his right to due process by dismissing his petition for the writ of habeas corpus before he could timely file his response to the state's motion to dismiss.

The state concedes that the Washington and Sullivan County Criminal Courts were without authority to order the petitioner's sentences to be served either concurrently or consecutively to future sentences. It claims, however, that the erroneous language is merely surplusage which should be deleted from the petitioner's judgments of conviction. The state contends that the petitioner's claim that the state failed to file a notice of its intent to seek enhanced punishment does not render the petitioner's judgments of conviction from Sullivan County void. The state contends that the Carter County Criminal Court's order imposing a split sentence involving both concurrent and consecutive sentencing was not in violation of any statute and is therefore not void. Finally, the state contends the petitioner's right to due process was not offended based upon the trial court's dismissing his petition before affording him an opportunity to respond to the state's motion to dismiss.

The trial court may summarily dismiss a petition for writ of habeas corpus relief when the petitioner does not state a cognizable claim. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). A petition for the writ of habeas corpus may only be brought if the judgment is void or the sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). However, if the

claimed illegality renders the judgment or sentence voidable, rather than void, no relief can be granted. Id. at 161. “If the face of the record shows that the court did not have jurisdiction, then the judgment is void.” Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). A sentence imposed in direct contravention of a statute is illegal and therefore void. Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000). If the petition fails to establish that the challenged judgment is void, the trial court may summarily dismiss it. See T.C.A. § 29-21-109; Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004). We review a trial court’s dismissal of a petition for habeas corpus relief de novo. Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000).

I. WASHINGTON COUNTY SENTENCES

_____ The petitioner contends his sentences from Washington County are illegal and void. He cites Thompson v. State, 565 S.W.2d 889 (Tenn. Crim. App. 1977), for the proposition that the trial court exceeded its statutory authority in ordering his sentences to be served concurrently with sentences not yet in existence from Sullivan County. The state concedes the trial court exceeded its authority in ordering concurrent sentencing with future sentences, but it contends the language in the judgment of conviction ordering such concurrent sentencing is merely surplusage.

_____ In Thompson, this court held that the Coffee County Criminal Court’s ordering the defendant to serve his sentence from Coffee County consecutive to a sentence not yet imposed from Franklin County was “without efficacy.” 565 S.W.2d at 889. The statute at issue in Thompson is currently codified at Tennessee Code Annotated section 40-20-111(a) and provides:

Concurrent or cumulative sentences.— (a) When any person has been convicted of two (2) or more offenses, judgment shall be rendered on each conviction after the first, providing that the terms of imprisonment to which such person is sentenced shall run concurrently or cumulatively in the discretion of the trial judge.

“T.C.A. § 40-20-111(a) indicates that imposition of judgments, including sentences, for existing convictions shall occur in a progressive fashion with the successive sentences being determined to be served concurrently or consecutively to those previously imposed.” State v. Arnold, 824 S.W.2d 176, 178 (Tenn. Crim. App. 1991). In Arnold, this court held that the language in the judgment of conviction ordering the sentence to be served consecutively to sentences not yet imposed “was surplusage and of no effect relative to the [later imposed] sentences.” Id.

We conclude that the language in the petitioner’s March 4, 1988 judgments of conviction from Washington County stating that the petitioner’s Washington County sentences were to be served concurrently with any sentence in Sullivan County was merely surplusage. As such, it does not render the petitioner’s Washington County judgments of conviction void, and the petitioner is not entitled to relief on this issue.

II. SULLIVAN COUNTY SENTENCES

_____ The petitioner contends his sentences from Sullivan County are illegal and void. He cites Thompson and claims that the trial court exceeded its statutory authority in ordering his seven-year sentence from March 23, 1988, to be served consecutively to his fifteen-year sentence which was not entered until May 31, 1988. He claims his May 31, 1988 sentence is void because the state failed to file a notice of intent to seek enhanced punishment. The state contends that the language in the March 23, 1988 judgment of conviction sentencing the petitioner to a term to be served consecutively to a sentence to be imposed in the future is merely surplusage and that the defendant's allegation that the state failed to file a notice of its intent to seek enhanced punishment does not constitute a cognizable ground for relief in a habeas corpus petition.

We conclude that based upon Thompson and Arnold, the language in the petitioner's March 23, 1988 judgment of conviction ordering the sentence in that case to be served consecutively to the May 31, 1988 sentence was surplusage and that it does not render the March 23, 1988 judgment of conviction void. We also conclude that neither the state's failure to file a notice of intent to seek enhanced punishment nor the trial court's classifying the petitioner as an "Especially Aggravated Offender" renders a judgment of conviction void.

III. CARTER COUNTY SENTENCE

_____ The petitioner contends that his Carter County judgment of conviction is void because his sentence is in direct contravention of a statute. He claims that under existing statutory law, a trial court could not impose both concurrent and consecutive sentencing to a split confinement sentence. The petitioner also contends his sentence is illegal because the length of his sentence was beyond the statutory range. He claims that as a Range I offender, the trial court did not have the authority to sentence him to the maximum statutory period, ten years, for grand larceny. He claims that because his sentence exceeds a Range I sentence, it is illegal. The state claims the petitioner has failed to show that his Carter County judgment of conviction is defective or illegal.

Initially, we note that the petitioner was sentenced in 1988. At that time, Tennessee law provided, "Where there are multiple convictions, the court shall order sentences to run consecutively or concurrently as provided by Rule 32 of the Tennessee Rules of Criminal Procedure or as elsewhere provided by law." T.C.A. § 40-35-210(e) (1982).

In State v. Connors, 924 S.W.2d 362 (Tenn. Crim. App. 1996), this court addressed a similar question to the one presented by the petitioner. Connors pled guilty to misdemeanor offenses, and the trial court ordered him to split confinement on all of his sentences. In one particular sentence, the trial court ordered the defendant to serve his period of confinement concurrently with another sentence but ordered him to serve his period of probation consecutively. Connors, 924 S.W.2d at 363. This court cited Tennessee Code Annotated section 40-35-115 and concluded that when a trial court imposes split confinement, the probationary period "must run in the same manner as the periods of incarceration." Id. at 364. We note that section 40-35-115 provides, "If a defendant is

convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively or concurrently as provided by the criteria in this section.” (Emphasis added). This court has since cited Connors for the proposition that “[a] trial court may not order confinement concurrently and probation consecutively from multiple sentences.” State v. Clark, 67 S.W.3d 73, 79 (Tenn. Crim. App. 2001).

We conclude that the Carter County Criminal Court’s sentence, imposing a term of confinement concurrent with one of the Sullivan County sentences and a term of probation consecutive to that same Sullivan County sentence was not authorized under Tennessee Code Annotated section 40-35-210(e) and is illegal. The petitioner is entitled to habeas corpus relief from his Carter County Criminal Court judgment of conviction, and we remand this case to the trial court for a determination of whether the petitioner is entitled to withdraw his guilty plea.

Concerning the petitioner’s argument regarding the length of his sentence, we initially note that the record contains two judgments of conviction from Carter County. The first is the original judgment entered in 1988 stating the petitioner was a Range II offender. The second is an amended judgment entered in 1991 differing only in that it reflects the petitioner was a Range I offender. We note that in 1988, the range of punishment for grand larceny was between three and ten years. See T.C.A. § 39-3-1104 (1982 & Supp. 1988). For a Range I offender, however, the range of punishment was “not less than the minimum sentence established by law, and not more than the minimum sentence plus one-half (½) of the difference between the maximum sentence and the minimum sentence.” T.C.A. § 40-35-109(a) (1982 & Supp. 1988). However, if “[t]he maximum range limit in Range I includes a fractional portion of a year, such range maximum shall be rounded down to the nearest whole year.” T.C.A. § 40-35-109(e)(1) (1982 & Supp. 1988). Therefore, the maximum sentence the petitioner could have received in 1988 as a Range I offender for grand larceny was six years. As such, he has established a prima facie case that his Carter County judgment of conviction is void. On remand, the trial court should determine whether the petitioner’s ten-year sentence entitles him to habeas corpus relief. See McConnell v. State, 12 S.W.3d 795, 798 (Tenn. 2000) (approving the mixing of offender classification and release eligibility dates in plea bargaining); see also Bland v. Dukes, 97 S.W.3d 133, 135-36 (Tenn. Crim. App. 2002).

IV. DUE PROCESS VIOLATION

The defendant contends that the trial court’s adjudication of his petition occurred before he could timely file a response to the state’s motion to dismiss. He claims this action violated his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The state claims that the Habeas Corpus Act does not guarantee a petitioner the right to respond to a motion to dismiss.

The petitioner’s brief is devoid of citation to authority to support the proposition that due process demands he be afforded an opportunity to respond to the state’s motion to dismiss. Accordingly, he has waived this issue. See Tenn. Ct. Crim. App. R. 10(b) (“Issues which are not supported by argument, citation to authorities . . . will be treated as waived in this court.”).

CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the trial court's dismissal of the petition as it relates to the Washington County and Sullivan County sentences. We reverse the trial court's order dismissing the petition as it relates to the Carter County judgment. On remand, the habeas corpus court is instructed to transfer the case to the Carter County Criminal Court for its determination of whether the petitioner is entitled to withdraw his guilty plea and for further proceedings consistent with this opinion.

JOSEPH M. TIPTON, JUDGE